

# EXHIBIT M

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 08-99000-smb

4 - - - - - x

5 In the Matter of:

6

7 ADMINISTRATIVE CASE RE: 08-01789 (SECURITIES INVEST-

8 ADVERSARY PROCEEDING),

9

10 Debtor.

11 - - - - - x

12

13 Adv. Case No. 10-04995-smb

14 - - - - - x

15 IRVING H. PICARD, TRUSTEE FOR THE LIQUIDATION OF BERNARD L.

16 MADOFF INVESTMENT SECURITIES LLC,

17 Plaintiff,

18 v.

19 TRUST u/art FOURTH o/w/o ISRAEL WILENITZ,

20 Defendants.

21 - - - - - x

22

23

24

25

1 Adv. Case No. 10-05184-smb

2 - - - - - x

3 IRVING H. PICARD, TRUSTEE FOR THE LIQUIDATION OF BERNARD L.

4 MADOFF INVESTMENT SECURITIES LLC,

5 Plaintiff,

6 v.

7 LAURA ANN SMITH REVOCABLE LIVING TRUST et al,

8 Defendants.

9 - - - - - x

10

11 Adv. Case No. 10-04352-smb

12 - - - - - x

13 IRVING H. PICARD, TRUSTEE FOR THE LIQUIDATION OF BERNARD L.

14 MADOFF INVESTMENT SECURITIES LLC,

15 Plaintiff,

16 v.

17 RAR ENTREPRENEURIAL FUND. LTD. et al.,

18 Defendants.

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U.S. Bankruptcy Court  
One Bowling Green  
New York, NY 10004

May 17, 2016  
10:51 AM

B E F O R E :

HON STUART M. BERNSTEIN  
U.S. BANKRUPTCY JUDGE

Hearing re: 10-04995-smb, 10-05184-smb, 10-04352-smb The  
Trustee's Request For Leave To File A Motion For a  
Protective Order in Wilentiz.

Transcribed by: Sonya Ledanski Hyde

1     A P P E A R A N C E S :

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3     WINDELS MARX LANE & MITTENDORF, LLP

4             Special Counsel to Irving H. Picard, as Trustee

5             156 West 56th Street

6             New York, NY 10019

7

8     BY:   KIM M. LONGO

9             JOHN J. TEPEDINO

10

11     BAKER HOSTETLER

12             Attorney for the Trustee

13             45 Rockefeller Plaza

14             New York, NY 10111

15

16     BY:   EDWARD J. JACOBS

17             NICHOLAS J. CREMONA

18

19     CHAITMAN LLP

20             Attorney for Defendants

21             465 Park Avenue

22             New York, NY 10022

23

24     BY:   HELEN DAVIS CHAITMAN, ESQ.

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1       ALSO PRESENT TELEPHONICALLY:

2       KEVIN H. BELL

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P R O C E E D I N G S

THE COURT: Madoff. Wait, I have one more...

MR. JACOBS: Good morning, Your Honor. Edward

Jacobs on behalf of the Trustee. I believe we're here this morning to discuss our April 6th letter seeking a protective order concerning certain discovery served by the defendant in the Wilenitz matter. Just to avoid any confusion from the start, there are 19 discovery requests at issue, but in the version served by the Defendant they're numbered 1 through 18, and one of them is unnumbered. So, by my count there are 19 requests in total. And they span a number of various topics, and I'm prepared to go through them each specifically today as briefly as I can.

But before I do, I would like to just provide a little bit of context to the Court, which I think would be helpful about what's been happening in discovery in this case. The Wilenitz matter is a case with a demand amount of, approximately, \$280,000. To be fair, Ms. Chaitman has told us that she intends to serve this identical discovery in all of her over 100 cases, so that would obviously implicate a number of other defendants with various demand amounts.

So, we feel that it's critically important that we have the issues resolved as quickly as possible so we don't needlessly have to duplicate litigation by arguing about

1 these same things in all of those cases.

2 What the Trustee has done in discovery in this  
3 case is quite remarkable, and I believe unprecedented, and  
4 we're very proud of it. Without even receiving a discovery  
5 request, we provide every single defendant with what we  
6 refer to as their core account documents, which are their  
7 customer statements, the cash activity of their accounts,  
8 their correspondence files with all of their correspondence  
9 to and from BLMIS over the life of their account; the  
10 account opening and closing documents; and in addition to  
11 that all of the applicable financial statements from BLMIS's  
12 financial institutions showing the bank transfer records  
13 from those independent third parties with respect to the  
14 cash activity in each and every single account.

15 Where we don't have a complete set of customer  
16 statements, we produce portfolio management reports, which  
17 contain exactly the same information of the cash activity  
18 over the life of the account. Where we don't have those, we  
19 produce spiral notebooks where various employees over time  
20 at BMOIS kept meticulous notes of that cash transaction  
21 activity.

22 And we provide that to every defendant. Wilenitz  
23 is no exception. We produced, I believe, approximately,  
24 19,000 records that we've indexed to make it easy for the  
25 defendant to navigate exactly what's in that --



1 THE COURT: 19,000 records for Wilenitz?

2 MR. JACOBS: For the Wilenitz accounts, correct,  
3 over the life of their accounts. And that includes all of  
4 the items that I just discussed.

5 In addition to that, obviously, it is the  
6 Trustee's burden of proof to prove that BLMIS was operating  
7 a fraudulent Ponzi scheme and was insolvent. So, as the  
8 Court I believe --

9 THE COURT: Why do you have to prove insolvency?  
10 You don't have to prove insolvency for an intentional  
11 fraudulent transfer. These are good faith cases.

12 MR. JACOBS: Right. Well, that is, I believe, our  
13 burden in the bad faith actions as well.

14 THE COURT: Why? To prove insolvency in an actual  
15 fraudulent transfer claim -- I've never heard of that.

16 MR. JACOBS: Well, that may very well be correct,  
17 Your Honor, but nonetheless, we have endeavored to make all  
18 of BMOIS's financial records available.

19 THE COURT: Let me ask, Ms. Chaitman, do you think  
20 that insolvency is an issue in these cases? Since their  
21 limited to intentional fraudulent transfers?

22 MS. CHAITMAN: I do, Your Honor.

23 THE COURT: Why?

24 MS. CHAITMAN: If, in fact, they could only  
25 recover transfers made within the last two years, then the

1 insolventy wouldn't be an issue. However, they are going  
2 back to the 1980s...

3 THE COURT: But not in the good faith cases.

4 MS. CHAITMAN: ...to calculate...

5 THE COURT: Oh, but those aren't -- I see what  
6 you're saying. But, you know, we've been through that one  
7 already. And those aren't transfers in the sense that we've  
8 been talking about. And I think the District Court judge  
9 agreed that those weren't transfers in the sense that the  
10 Court's own conveyance laws mean transfers.

11 MS. CHAITMAN: Here's my thinking, Judge, and  
12 perhaps you'll disagree with me, but the Trustee makes a  
13 determination of what each defendant's net equity is.

14 THE COURT: Right.

15 MS. CHAITMAN: He does that by going back to the  
16 inception of the original account. In my opinion, he has to  
17 establish that Madoff was insolvent in 1980 because  
18 otherwise, how can he invalidate a position that the  
19 Defendant or the Defendant's grandfather had in 1980? I  
20 think he has to prove -- I think the Trustee has to prove  
21 that Madoff was insolvent and operating a Ponzi scheme for  
22 the entire period for which he's netting out --

23 THE COURT: Well, I agree that he has to prove he  
24 was operating a Ponzi scheme because the transfers have be  
25 made in connection with the Ponzi scheme to get the Ponzi

1       scheme assumption, but it doesn't sound to me like he's got  
2       to prove that Madoff was insolvent to compute net equity by  
3       going back and figuring out what was really in the  
4       transferor's account in the amount that was actually  
5       credited to the transferee account. And, again, I use  
6       transfer, and transferor, and transferee -- not in the sense  
7       used in the Bankruptcy Code; just to describe what happened.  
8       But, all right.

9               MR. JACOBS: Well, Your Honor, back in 2009, as  
10       I'm sure you're aware, we negotiated with a large group of  
11       defendants a procedures order that governs all of the good  
12       faith actions; and in connection with that there was an  
13       order entered that I refer to as the procedures order that  
14       allows the Trustee to make available large amounts of data  
15       through an electronic data room and could submit a summary  
16       report of that information concerning relevant topics  
17       through a summary or an expert report.

18               That's exactly what we've done with respect to the  
19       Ponzi. As Ms. Chaitman knows, we have an expert named Mr.  
20       Dubinsky, who offers a very comprehensive report on that  
21       subject, and all of the data that he considered and utilized  
22       in connection with his opinions have been made available to  
23       every defendant through an electronic data room that  
24       contains, approximately, 4 million records.

25               That report has not yet been served in the

1 Wilenitz matter, but a copy of that report has been served  
2 to Ms. Chaitman on behalf of some of her other clients in  
3 different proceedings. And in Section 4C of the procedures  
4 order, that permits the Trustee to handle the voluminous  
5 nature of discovery that's potentially relevant in this case  
6 in that fashion.

7 THE COURT: Well, does Ms. Chaitman or any other -  
8 - clients or any other defendant have the ability to look at  
9 the same documents that your expert looked at and draw their  
10 own conclusions?

11 MR. JACOBS: Absolutely. Every single document --  
12 what we've endeavored to do, Your Honor, is that what we  
13 refer to as Electronic Data Room 1 contains all of the  
14 underlying documents considered by Mr. Dubinsky and we're  
15 also building upon that in including documents that our  
16 other experts who we may offer to prove transactions and who  
17 do other functions, all of those documents as well. So,  
18 that's approximately 4 million records. Not pages, but  
19 records.

20 And it's an enormous amount of data that I believe  
21 is unprecedented, at least in my career, and for that reason  
22 we've structured the data room in a very organized fashion  
23 with issue trees. So if you're a participant who's  
24 accessing the data room, you'll see something that you might  
25 be familiar with already in terms of like, an Outlook email

1 folder tree that has topics, broken down documents,  
2 financials, third party records; and then each of those  
3 trees can be broken down further to drill down to J.P.  
4 Morgan statements. You know, Chicago Options Trading  
5 information, Depository Trust Clearing Corporation  
6 documents; all of those types of things. It's also  
7 searchable.

8 So, absolutely the Defendant has the ability to  
9 conduct whatever investigation they believe is relevant to  
10 the claims of their defenses, the same that our expert did,  
11 and they have access to all the same information that our  
12 expert did. And we did that to be transparent and to  
13 provide any data that any litigant believes that they should  
14 have access to.

15 So, that's the starting point of where we are in  
16 discovery. And then because Section 4C of the procedures  
17 order allows us to provide a summary report, we do that.  
18 And Mr. Dubinsky painstakingly analyzes the Ponzi scheme and  
19 the IA business specifically, but also the other aspects of  
20 BLMIS's businesses as well. And issues of insolvency are  
21 also part of his analysis to the extent they may bear on the  
22 Ponzi scheme or on other proofs we may have, or have had at  
23 some point in our cases.

24 But all of the financials are considered, the  
25 Ponzi scheme is considered, the stock-trading activity or

1 lack thereof in the IA business is considered, in addition  
2 to the activities of House Five proprietary trading function  
3 of BLMIS and the market-making function of BLMIS.

4 As the Court, I'm sure, is aware, Rule 26 of the  
5 Federal Rules of Civil Procedure governs discovery and our  
6 actions, and that rule was recently amended in December of  
7 2015. The standard that discovery must be reasonably  
8 calculated to lead to admissible evidence no longer exists  
9 in the rule. It was specifically eliminated. And it was  
10 replaced with language that says that discovery served must  
11 be relevant and proportionate to the needs of the case. And  
12 what does proportionate mean?

13 Section B1 actually lists factors that the Court  
14 should consider in determining whether discovery is  
15 proportionate, and those include, and I quote, "the  
16 importance of the issues at stake in the litigation, the  
17 amount in controversy, the parties' relative access to  
18 information, the parties' resources, the importance of the  
19 discovery in resolving the issues, and whether the burden or  
20 expense of the proposed discovery outweigh its likely  
21 benefit.

22 We submit, Your Honor, that upon an examination of  
23 all 19 of these requests, the overwhelming majority of them  
24 to begin with have no relevance to this litigation or these  
25 claims.

1 THE COURT: Which ones do?

2 MR. JACOBS: There is a group of requests that  
3 arguably have relevance to... And in discussions with Ms.  
4 Chaitman yesterday I know that she believes they have  
5 relevance to whether or not BLMIS was operating a Ponzi  
6 scheme, and those are 13, 14, 15, 16, 17, and 18.

7 In addition to that there are three requests that  
8 ask for the Trustee to identify any instance of a factual  
9 error in any of BLMIS's books and records over any time  
10 period, which are objectionable for a number of reasons I  
11 would like to discuss with the Court Further -- but those  
12 may arguably have relevance as well. Those are 2, 3, and 5.

13 But with respect to those requests in particular,  
14 I would state for the Court that the Defendant in this  
15 action submitted an affidavit in connection with her claim  
16 stating that she had done a reconciliation of her customer  
17 statements with her own bank accounts and that those bank  
18 accounts confirmed that the customer statements for the  
19 relevant accounts were accurate.

20 So, the issue of whether BLMIS's books and records  
21 are accurate or inaccurate with respect to cash activity is  
22 not an issue in dispute in this case.

23 THE COURT: Well, it is, though. It is. Because  
24 at the end of the day, you have to prove the amount of the  
25 fictitious profits, basically -- the extent of liability.

1 And that involves transfers that occurred long before the  
2 two-year period. Were there transfers from other accounts  
3 in this case? Interaccount transfers?

4 MR. JACOBS: There were interaccount transfers in  
5 this case, Your Honor.

6 THE COURT: All right. You would have to prove  
7 that the Trustee -- or those account transfers were  
8 correctly computed.

9 MR. JACOBS: From a net equity perspective, we  
10 absolutely agree, yes.

11 THE COURT: Yeah. So, all I'm saying is although  
12 the claim only reaches back two years, you still have to  
13 compute whether you call it net equity or fictitious  
14 profits, that still has to be demonstrated so that you know  
15 the scope of the liability.

16 MR. JACOBS: That's correct, Your Honor. And as  
17 you may recall from the (indiscernible) trial, we submit  
18 experts whose specific function is to do that.

19 THE COURT: Okay, but the Defendants are entitled  
20 to see the data --

21 MR. JACOBS: That's absolutely right. And we have  
22 already produced in this litigation, without even having  
23 received a document request, 100 percent of that data. So  
24 the Defendants have all of those records that we intend to  
25 rely upon in order to prove both the net equity and to trace



1 the transfers.

2 THE COURT: So, you produce the records of other  
3 accounts, for instance, the transferor accounts?

4 MR. JACOBS: We do, Your Honor. We call that our  
5 initial disclosure production. In every case where there's  
6 an interaccount transfer, we replicate our production of the  
7 CADs, which I described earlier, for any related accounts.  
8 And by related accounts, to be clear, in our mind that means  
9 any account that transferred money to the sued upon account.  
10 We do provide all of that documentation.

11 And also, the only additional possible discovery  
12 that I believe would be relevant to the issues of transfers  
13 and net equity are the Defendants' own bank records. And as  
14 Your Honor I know is aware, this Defendant in addition to  
15 others, have vigorously contested our right to those  
16 documents. The Court has rejected those objections. That's  
17 no longer an issue in this case, although I think we're  
18 going to be talking about that in some others again later.

19 But in any event, our position is that the bank  
20 records have limited utility. Our experts will submit  
21 reports that detail exactly why BLMIS's books and records  
22 are accurate and reliable for the cash activity, transaction  
23 activity for every relevant account over the life of the  
24 account. Those reports have not yet been submitted but I  
25 can promise the Defendant and the Court that they will be

1       forthcoming in the expert phase of discovery in this case.

2               If it pleases the Court, I just would like to turn  
3       to some of the other categories of request that are at issue  
4       today. Well, first, let me finish my response to the  
5       request that the Court asked about -- the small handful of  
6       requests, maybe -- I'm bad at math on the spot but 6 to 8  
7       that actually would potentially go to issues of the Ponzi  
8       scheme.

9               THE COURT: You didn't list that as your arguably  
10       relevant criteria.

11              MR. JACOBS: I'm sorry?

12              THE COURT: I asked you which of the requests were  
13       arguably relevant.

14              MR. JACOBS: Right.

15              THE COURT: You told me 13 through 18 and maybe 2,  
16       3, and 5 with a caveat.

17              MR. JACOBS: Correct. And to specifically further  
18       address 13, 14, 15, 16, 17, and 18, there is one request  
19       that asks for the Trustee in an interrogatory response to  
20       set forth the basis of -- that BLMIS was insolvent over  
21       every year going back to, I believe, 1982. Obviously, we  
22       don't believe that is an appropriate request. The burden  
23       clearly would not outweigh any likely benefit, given the  
24       fact that --

25              THE COURT: Well, the Trustee has to prove...

1       Apparently, you agree with Ms. Chaitman that the Trustee has  
2       to prove --

3               MR. JACOBS: To be clear on the record, I don't  
4       agree with her characterization of our burdens of proof.  
5       But Mr. (indiscernible) does address issues of insolvency in  
6       BLMIS's financials in his report in painstaking detail. So,  
7       to the extent that information is relevant or would be  
8       relevant at any point in time, it's something that we  
9       provided through the summary report, which the procedures  
10      order allows us to do. And we've also made available all of  
11      the underlying documentation that's referenced in that  
12      report.

13             THE COURT: Okay. Have you produced the report,  
14      the insolvency report?

15             MR. JACOBS: Not in this case, Your Honor. Not  
16      yet. We are not yet in expert discovery. But Ms. Chaitman  
17      does have a copy from other cases that are further advanced  
18      and substantively the report --

19             THE COURT: It sounds like the basis of the  
20      Trustee's opinion is the expert report.

21             MS. CHAITMAN: Do you want me to...?

22             THE COURT: Well, why don't you finish and then  
23      we'll hear from you.

24             MR. JACOBS: Okay. So, that request, in essence,  
25      we're saying is burdensome to the extent that she's asking

1 us to prematurely provide our report, we will provide our  
2 report. Ms. Chaitman will have an opportunity to consider  
3 all of the records our expert considers. She'll have an  
4 opportunity to depose Mr. Dubinsky, although she hasn't yet  
5 deposed him in any other case. And at a minimum, the  
6 Defendants should have to start with the voluminous  
7 discovery we've already provided before more is demanded.  
8 And I think that is a principle that is expressly baked into  
9 Rule 26, particularly in light of the recent amendment,  
10 where the purpose of the amendment is to ensure that  
11 litigants don't get to engage in endless and abuse of  
12 discovery. And I think that that request falls into that  
13 category of needless abuse of discovery, particularly given  
14 everything we've already provided.

15 The same is true within that group of requests --  
16 there are several requests that ask for stock trading  
17 records for the market-making side of the business, and the  
18 proprietary trading side of the business, and the IA side of  
19 the business. However, our contention is there were no  
20 stocks ever traded for any IA investment advisory customer.  
21 And that request asks for that documentation going back to,  
22 I believe, 1982.

23 Your Honor, the Wilenitz accounts were opened in  
24 2003, so how can any stock trading activity for any part of  
25 the business, however unconnected it may be to this

1 Defendant's IA account, have any relevance beyond 2003 as an  
2 initial matter? But even with respect to the documents  
3 post-2003, again, our expert report does a very  
4 comprehensive analysis of how the AI business was conducting  
5 a Ponzi scheme when those docs were traded.

6 THE COURT: Are you arguing that the requests are  
7 irrelevant or that they're premature because they're really  
8 expert discovery type requests?

9 MR. JACOBS: Both, Your Honor. I think that while  
10 the relevance issue is murky -- I'm not contesting that that  
11 request may be relevant; what I'm contesting is that the  
12 request is not proportionate to the needs of the case. The  
13 Defendant should have to make an explicit showing as to how  
14 or why that particular discovery is needed. And, first and  
15 foremost, they need to review and consider the voluminous  
16 discovery precisely on that topic we've already provided.

17 So, for example, on my call with Ms. Chaitman  
18 yesterday we tried to resolve some of these issues to  
19 hopefully not burden the Court and we couldn't. But we  
20 discussed that in 2014, we produced to Ms. Chaitman all of  
21 the DTCC records that we had showing daily stock positions  
22 at BLMIS -- any part of the business going back to 2002.  
23 She has that information.

24 Apparently that didn't satisfy her, so she's  
25 served this request, which clearly under the proportionality

1 standards of Rule 26, we should not have to answer. Because  
2 it is the burden of the requesting party to show the  
3 relevance of the request after an objection has been made.  
4 So we're objecting that it's disproportionate to the needs  
5 of the case, it's burdensome, it's of questionable relevance  
6 because there's been no showing as to how that would further  
7 the Defendant's ability to defend against our claims.

8 THE COURT: All right, let me hear from Ms.  
9 Chaitman generally and then we'll go through each of the  
10 requests. It's just easier to do it that way.

11 MS. CHAITMAN: Sure. If I can just begin, Your  
12 Honor, by explaining one thing: I had proposed to Baker &  
13 Hostetler a couple of months ago that we enter into a  
14 consent order with respect to all of my cases -- it's a  
15 little bit less than 100 -- that discovery served in one  
16 case would be applicable in all cases. In other words, I  
17 said, don't force me to serve 100 discovery demands that are  
18 identical in all of my cases. Let's just agree that I can  
19 serve them in any case but the demands and the responses and  
20 any court rulings relating to those, unless there's a reason  
21 to distinguish one defendant from another, would be  
22 applicable in all cases.

23 They didn't get back to me on this. This would  
24 simplify all of this a great deal. Otherwise, Your Honor,  
25 we're all going to be burdened, you most of all. It's just

1 silly. And, you know, what I tried to do with this -- with  
2 Wilenitz -- yes, every account is different, but the fact of  
3 the matter is I represent defendants in 100 cases and we  
4 ought to be able to do this in a reasonable way.

5 THE COURT: I don't disagree with you. I don't  
6 want to do this 100 times. And nobody does, so...

7 MS. CHAITMAN: Exactly. So, may I submit to --

8 THE COURT: Well, have the same discovery requests  
9 been served in every case?

10 MS. CHAITMAN: I haven't done it yet because I had  
11 asked for a conference with you to try to resolve this.

12 THE COURT: Well, why don't we go through these  
13 discovery requests and maybe we can pare down what you're  
14 entitled to ask for in future cases, and this'll provide  
15 some guidance in all the cases. The results can be the same  
16 unless some case has a nuance -- like Wilenitz only goes  
17 back to 2003; maybe some other case goes back to 1986 or  
18 whatever.

19 MS. CHAITMAN: If I can say, Your Honor -- I'm  
20 happy to go through these with you now, but I would like to  
21 make a formal motion because --

22 THE COURT: A formal motion for what? To compel  
23 discovery?

24 MS. CHAITMAN: Yes. Because it's important for  
25 the record to contain an order. I mean, these go to

1 affirmative defenses that we have in the case. If, in fact,  
2 the Court is not going to permit discovery on some of the  
3 affirmative defenses, then in a sense, the Court is striking  
4 an affirmative defense. And I think that in order to  
5 protect the record, we ought to be able to go through the  
6 process of a motion, briefing, and then a formal order.

7 THE COURT: Well, I'm not going to tell you can't  
8 make a motion to compel discovery, but that said, maybe we  
9 can go through these and we can talk about them.

10 MS. CHAITMAN: Okay.

11 THE COURT: Some of the argument that I'm getting  
12 from Jacobs seems to suggest that discovery may be relevant  
13 but it's really expert discovery. And that you should take  
14 the deposition of the expert, ask he or she what she relied  
15 on, and then ask for those documents, I guess. Although it  
16 sounds like they've been produced or made available anyway.

17 MS. CHAITMAN: What I'm trying to flesh out, Your  
18 Honor -- I think --

19 THE COURT: But the Trustee's not going to do your  
20 work.

21 MS. CHAITMAN: I'm not asking the Trustee --

22 THE COURT: Well, but you are. For example, one  
23 of these or maybe a couple of these said, "Identify every  
24 instance in which there was an error in any account,"  
25 putting aside the relevancy of that. You could do the same



1 analysis that the Trustee did and come up with --

2 MS. CHAITMAN: I couldn't possibly do it. What  
3 I'm asking the Trustee to do, as you know from the profit  
4 withdrawal issues, there's a great deal of question as to  
5 the accuracy of the records. And the Trustee's own expert  
6 has said that these records are riddled with fraud and that  
7 they're not reliable. That was the basis of the Second  
8 Circuit's ruling.

9 THE COURT: Now that the dollars are in and the  
10 dollars are out, it would deem reliable by the Second  
11 Circuit, because that was the basis of the net decision.

12 MS. CHAITMAN: But there was no factual record  
13 before the Court. There was certainly no --

14 THE COURT: Let me ask the question -- putting  
15 aside the profit withdrawal issue, if the records were  
16 riddled with fraud but your records are right, your clients'  
17 records are right, what difference does it make? Do you  
18 think I'm going to draw an inference -- do you think I'm  
19 going to try in every single case whether or not as a  
20 general matter the records were accurate in every sense?

21 MS. CHAITMAN: Judge, here's the problem: Let's  
22 just review the --

23 THE COURT: And Wilenitz agreed that he received  
24 the --

25 MS. CHAITMAN: No, no, no, but Mr. Jacobs didn't

1 clarify what he was saying. For the period from 2000 on,  
2 she had the bank records. And her SIPA claim said she  
3 compared her bank records to the statements. But the  
4 account predated that. This was --

5 MR. JACOBS: The accounts were opened in 2003,  
6 Your Honor.

7 MS. CHAITMAN: But it was a successor account. It  
8 had transfers into it from other accounts.

9 THE COURT: But they would've only occurred after  
10 2003, right?

11 MS. CHAITMAN: No, the prior accounts were in the  
12 1990s.

13 THE COURT: All right.

14 MS. CHAITMAN: So, if I can just explain...

15 THE COURT: I said, you are entitled to go back...  
16 Any information relating to the computation of the amount of  
17 fictitious profits. And if that involved transfers in old  
18 accounts that went back to the 1980s, you're entitled to see  
19 that. I don't dispute that.

20 MS. CHAITMAN: Right. But here's my point, Your  
21 Honor: The DTC of trading records exists from 2002 on.  
22 There is no evidence either way of trading prior to that.  
23 No documentary evidence. With respect to third party bank  
24 records, the J.P. Morgan Chase account records, the Trustee  
25 has those from December 1998 on.

1           So, again, we have a vacuum of any third party  
2 records which, in my opinion, are more reliable than  
3 Madoff's records, for any transfers predating December 1998.  
4 Now, the clients don't have these. First of all, a lot of  
5 these clients received this money from someone else, through  
6 an interaccount transfer, so it's not even that they can say  
7 with personal knowledge that they recall or don't recall  
8 something.

9           THE COURT: But I thought Mr. Jacob said --  
10 basically, all of the data that you would need to answer  
11 these interrogatories or I guess document requests,  
12 whichever, have been provided.

13           MS. CHAITMAN: Your Honor, here's the thing:  
14 There are, whatever, 4 million pages of documents in the e-  
15 data room, but I want the Trustee to commit in writing to a  
16 position which I can then use to either move to dismiss the  
17 complaint because there'll be an utter failure or proof, or  
18 whatever. I'm entitled to know whether...

19           First of all, he has no records other than  
20 Madoff's own records. If in the course of his work as a  
21 Trustee there have been 150 instances where he has concluded  
22 that there were factual errors in the reports, you don't  
23 think that that's important for you to know? Not  
24 necessarily for Wilenitz but...

25           THE COURT: But if we're trying the Wilenitz case

1 and there are no factual errors vis-a-vis Wilenitz...

2 MS. CHAITMAN: But there are, because how does the  
3 Trustee --

4 THE COURT: Well, fine. No, he could find that  
5 out.

6 MS. CHAITMAN: No, no, no, but how does the  
7 Trustee... The Trustee's going to come in and say that for  
8 the period prior to December 1998, I'm relying on Madoff's  
9 internal records.

10 THE COURT: Right.

11 MS. CHAITMAN: And he's refusing to tell me  
12 whether he's found that Madoff's internal records are  
13 reliable. We know, for example, one of his profit  
14 withdrawal experts said that... Forgive me, but I don't  
15 remember the exact number. I think the expert concluded  
16 that there were 47 entries which were inconsistent with the  
17 conclusion that he reached. And he concludes that that was  
18 simply a mistake.

19 Well, okay. So, how many times in the records, in  
20 Madoff's internal records were there mistakes?

21 THE COURT: Ms. Chaitman, I hear what you're  
22 saying but I'm saying that unless the mistakes are in the  
23 account of the particular adversary proceeding at issue, the  
24 fact that there are mistakes in other accounts or other  
25 records doesn't matter.

1 MS. CHAITMAN: But if you have no one with  
2 personal knowledge, putting aside the rules of evidence,  
3 which I think the Trustee can't even deal with, I don't  
4 think the Trustee can even prove anything based on the rules  
5 of evidence. But let's assume that you let it in, just for  
6 the weight of it, okay? Let's say that -- how is Evelyn  
7 Berezin Wilenitz, who inherited this account from her  
8 deceased husband, how is she supposed to know whether he  
9 realized there was a mistake in 1983 or whatever the year  
10 was? It's impossible.

11 THE COURT: But you get the records...

12 MS. CHAITMAN: But what do we compare them  
13 against?

14 THE COURT: How would we know there's a mistake  
15 unless he's got two sets of records for the same  
16 transaction, which indicates a mistake?

17 MS. CHAITMAN: What I'm saying is that the  
18 profitable withdrawal expert for the Trustee concluded that  
19 there were 47 or whatever it was mistakes in Madoff's  
20 account records.

21 THE COURT: Were there any in the Wilenitz  
22 account?

23 MS. CHAITMAN: No, because he was looking at a  
24 different issue. But what I'm saying to you is that if  
25 these reports were generated by people who were careless,

1 incompetent to do the job, deliberately motivated to  
2 misrepresent what was going on in the transactions, that's  
3 relevant.

4 THE COURT: So you can ask him at a deposition.  
5 That sounds like expert discovery.

6 MS. CHAITMAN: No, because I'm... If the Trustee  
7 -- if it's been brought to his attention that the internal  
8 records are full of factual errors, I think he has an  
9 obligation to disclose that.

10 THE COURT: I think I disagree. Let's go through  
11 the request... As I said, you can make a motion to compel.  
12 I can't tell you that you can't --

13 MS. CHAITMAN: Yeah, I'd like to at the end of  
14 this, just so we have a clear record of what the rulings  
15 are.

16 THE COURT: All right. With respect to one, list  
17 the name and address... Well, I don't have to read it.  
18 It's in there.

19 MS. CHAITMAN: Yeah.

20 THE COURT: I'm looking at Document 63-1.

21 MR. JACOBS: Right.

22 THE COURT: Is there an objection to that?

23 MR. JACOBS: Yes, Your Honor. This request is  
24 like the other... As the Court pointed out with respect to  
25 other requests, this request is essentially seeking our work

1 product.

2 THE COURT: That was my reaction when I saw it.

3 MR. JACOBS: And I explained to Ms. Chaitman on  
4 the phone yesterday that, as she knows, there are  
5 potentially upcoming depositions of BLMIS employees  
6 happening in the PW context. She has a right to transcripts  
7 of those depositions or to participate.

8 THE COURT: Does she have the right to ask you who  
9 you spoke to? Forgetting about what they said.

10 MR. JACOBS: She absolutely doesn't. That's our  
11 investigatory work product. And any mental impressions, or  
12 memos, or notes that we took during our investigation are  
13 work product that are shielded from discovery.

14 THE COURT: Certainly, when you asked for witness  
15 statements, that sounded like Hickman v. Taylor, which was  
16 the issue in that case.

17 MS. CHAITMAN: You know what, Judge? The reason I  
18 want to brief that issue is that a SIPA trustee has specific  
19 obligations to investigate the debtor and report to the  
20 creditor body on what he finds. And I think that there's a  
21 very strong issue there. This is not a typical adversary.  
22 This is an adversary who's appointed pursuant to a federal  
23 statute, which was intended to protect the customers.

24 THE COURT: Well, the same is true of a trustee,  
25 as a representative of the estate.

1 MS. CHAITMAN: I know, but there are SIPA overlays  
2 here. Let's just hypothesize that the Trustee has come to  
3 realize that Madoff's internal records are completely  
4 unreliable. Is he then allowed to conceal that information  
5 from the Defendants and pursue discovery, asking the Court  
6 to rely upon documents that the Trustee has already  
7 determined are completely unreliable?

8 THE COURT: Isn't it really for me to determine  
9 whether or not the records... I assume the Trustee is going  
10 to try and prove the cases through the records, whether or  
11 not the records are credible.

12 MS. CHAITMAN: Yes, but wouldn't you be -- you  
13 wouldn't be influenced by the fact that the Trustee comes in  
14 and says, I've determined -- I found 1,000 errors in this  
15 body of documents?

16 THE COURT: Is it your position that the Trustee  
17 can make no mistake in this case?

18 MS. CHAITMAN: It's not the Trustee's mistake;  
19 it's the Madoff records...

20 THE COURT: No. No. Yes, the Trustee has  
21 statutory duties under SIPA, but the Trustee is also a  
22 litigant. And I don't think that either as a claim  
23 determining person, who's certainly following an objection,  
24 or as a plaintiff in an adversary proceeding, that the  
25 Trustee has additional duties beyond the ordinary litigation



1 duties to bear his soul and to file a complaint and say, you  
2 know, I really don't think that I have a claim here but I'm  
3 going to file it.

4 But in any event, I agree that Number 1 sounds  
5 like it's work product, assuming it's material prepared in  
6 anticipation of litigation, and I realize the Trustee has  
7 certain SIPA duties to do this without regard to litigation,  
8 but also has litigation duties and it's...

9 MS. CHAITMAN: All right, so I'd like to brief  
10 that issue, Your Honor. And Number 2 goes to the same  
11 issue.

12 THE COURT: Let me just read this. I think Number  
13 2 is irrelevant and goes beyond the proportionality  
14 standards -- the new rules. If the records in your case are  
15 right, it doesn't matter if the other records are wrong.  
16 And if the records in your case are wrong, it doesn't matter  
17 that all the other records are right. It's about your case  
18 that we're trying.

19 MS. CHAITMAN: But, Your Honor --

20 THE COURT: And I don't think that under the  
21 federal rules of evidence I can draw -- infer a pattern and  
22 practice of negligence or improper record-keeping, which is  
23 really what you're asking me to do.

24 MS. CHAITMAN: Well, I think what I'd like to do  
25 is put this in a motion and lay out the rules of evidence.

1 Because when you compare what the rules of evidence permit  
2 with -- it's unusual in my experience for a trustee to be  
3 relying upon records that go back as far as these records,  
4 that were prepared in connection with a Ponzi scheme by  
5 people who were either obviously criminals or paid to  
6 overlook what they were seeing.

7 THE COURT: You know -- and maybe this motion that  
8 you're contemplating would be a good way to narrow the  
9 overall scope of discovery... By the way, again, I come  
10 back to the point that I don't think solvency is relevant.  
11 And if you want to set up some sort of omnibus procedure and  
12 maybe we can just cut those -- not out of all these cases.  
13 I may be wrong but this is an intentional fraudulent  
14 transferred case; solvency or insolvency is simply not  
15 relevant. It's not an element of the claim.

16 MR. JACOBS: Right. Your Honor, may I confer  
17 internally with my colleagues, and can we get back to the  
18 Court about that proposal, which makes perfect sense?

19 THE COURT: Yeah, I'm just throwing that one out.  
20 Three, again, it's the same thing -- it's errors in other  
21 persons' accounts. And it sounds to me that at the end of  
22 the day, the Trustee has produced all this information  
23 anyway. So, you can do the same analysis, can't you?

24 MS. CHAITMAN: How would we know, Your Honor, if  
25 there was a mistake in a statement that was prepared in

1 1983?

2 THE COURT: Well, how would the Trustee know?

3 MS. CHAITMAN: Because he might have found  
4 conflicting evidence. In fact, as I said, as one example,  
5 his expert on the profit withdrawal issue said that there  
6 were, I think, 47 entries which were inconsistent, and he's  
7 concluded that those were mistakes.

8 THE COURT: Right. So, the expert's -- and you'll  
9 get all of the entries the expert looked at and you'll get  
10 the account statements, and you can do the same analysis.

11 MS. CHAITMAN: But that's limiting... Then I'm  
12 only getting what the expert got. And there may be a whole  
13 body of evidence which disproves the expert's conclusions.

14 THE COURT: That's speculative. But I think that  
15 maybe in response to the motion I have to understand what's  
16 in the data room, and what's being produced. I know that  
17 you've told me it many times.

18 MR. JACOBS: Yes.

19 THE COURT: And it kind of rolls over my head  
20 sometimes. But I mean, the bottom line is if you can do the  
21 same analysis with the same data, because --

22 MS. CHAITMAN: I can't.

23 THE COURT: Let me just finish. Then why does the  
24 Trustee have to do this? Putting aside the relevance  
25 questions.

1 MS. CHAITMAN: Because the Trustee is in a unique  
2 position to have investigated the Debtor with, you know,  
3 hundreds of millions of dollars of expert assistance, and he  
4 has unique access to the employees, and he has the ability  
5 to know information that there's no way I could ever  
6 duplicate.

7 THE COURT: Like what? I mean, it might take time  
8 and money, I understand that, but I just don't understand --

9 MS. CHAITMAN: Like someone coming in and saying,  
10 you know, we falsified these entries. We just made them up.  
11 Because some of these --

12 THE COURT: Well, obviously, they're all false.

13 MS. CHAITMAN: Well, you're saying the deposits  
14 and withdrawals --

15 THE COURT: Right, those are not.

16 MS. CHAITMAN: Okay. But what I'm saying to you  
17 is it may very well be... I happen to believe, based on  
18 what people have told me, certainly with respect to the  
19 profit withdrawals, that these were not received. They may  
20 have been received by somebody else but they weren't  
21 received by the customers.

22 THE COURT: Well, then the customer denies that  
23 they received it. I just... You know, you're certainly  
24 entitled to know whether the records regarding the  
25 particular defendant are correct, but if there was a mistake

1 or a phony record on somebody else's account in 1986, I just  
2 don't... It's just not relevant. And, as I said, you can  
3 probably do the same analysis anyway.

4 Number 4 is the same thing. A lot of this is in,  
5 what is it, the Calura report or the Greenblatt report?

6 MR. JACOBS: Well, both of those reports cross-  
7 reference each other, so I tend to view it, personally at  
8 least, as a comprehensive report. But the issue with PW  
9 here, Your Honor, is that obviously the request is seeking  
10 that documentation across the entire body of customer  
11 accounts, right, at all periods in time, and as a --

12 THE COURT: Let me ask you a question, though, on  
13 this one. Does Wilenitz have any profit withdrawal...?

14 MR. JACOBS: It does not. Not in this --

15 THE COURT: Well, how can you ask for that in this  
16 case?

17 MS. CHAITMAN: I think that, first of all, what I  
18 intended to do, Your Honor, was have one set of  
19 interrogatories that would cover all of my clients.

20 THE COURT: But in this case -- you're telling me  
21 you're going to make a motion to compel.

22 MR. JACOBS: Right.

23 THE COURT: Are you going to make a motion to  
24 compel on Question Number 4, where there are no PW entries  
25 in this particular defendant's...?

1 MS. CHAITMAN: I need to go back. I don't recall  
2 at this moment whether the predecessor account had PW  
3 entries.

4 THE COURT: Okay, fair enough.

5 MR. JACOBS: The predecessor accounts did not have  
6 any PW actions. I checked that in preparation for this  
7 hearing.

8 THE COURT: All right. Well, she's entitled to  
9 check that and --

10 MR. JACOBS: But, Your Honor --

11 THE COURT: (indiscernible) have been made  
12 available.

13 MR. JACOBS: But this illustrates nicely the exact  
14 reason why a standing order allowing discovery served by Ms.  
15 Chaitman to apply in every single case just can't possibly  
16 be workable.

17 THE COURT: Well, I don't want to go through this  
18 100 times.

19 MR. JACOBS: I agree, Your Honor. And if I may,  
20 you know, the protective order that Your Honor issued in the  
21 Nelson cases regarding discovery served, which is at issue  
22 here as well, concerning the Trustee's compensation, is a  
23 perfect example. And I had a call with Ms. Chaitman  
24 yesterday where I said, I understand you want to preserve  
25 that issue in all of your cases. We'll stipulate to that so

1 that it doesn't need to be re-litigated. But we're  
2 litigating in two District Courts. We've litigated it here.  
3 We've litigated it before Judge (indiscernible). We've  
4 litigated it before Judge Rakoff. There has to be an end at  
5 some point to litigation on the same issue.

6 So, we're happy to stipulate as orders are  
7 entered, and I understand the Defendant's desire to want to  
8 preserve their right to appeal. We have no objection to  
9 that. But we can't have a standing order that everything in  
10 one case applies to the other.

11 I also asked Ms. Chaitman, based on my  
12 representation that we would stipulate to that effect, that  
13 she withdraw this discovery and she refused. So here we are  
14 having yet another hearing.

15 THE COURT: Why don't we get back to the requests?

16 MS. CHAITMAN: Which one are you up to now?

17 THE COURT: Five.

18 MS. CHAITMAN: You're up to five?

19 THE COURT: I mean, I don't even know what that  
20 means. But it's more of this kind of all of the records  
21 type thing. I'll decide whether or not the records  
22 accurately prove that the Trustee has to prove in a  
23 particular --

24 MR. JACOBS: In this request, Your Honor, Ms.  
25 Chaitman raises this "riddled with fraud" accusation in

1 various contexts.

2 THE COURT: It's (indiscernible)...

3 MR. JACOBS: I have no idea.

4 MS. CHAITMAN: It's from the original Dubinsky  
5 report.

6 MR. JACOBS: I checked that report. I was not  
7 able to find it there. So, to me, this request --

8 THE COURT: You can't do a text search? It's text  
9 searchable, isn't it?

10 MR. JACOBS: It is. It's a PDF text-searchable  
11 report. I checked both the earlier report and the current  
12 report, which has been revised. I couldn't find it. But I  
13 mean, this request to me is also in addition objectionable  
14 for that reason. It's just nonsensical. I mean, how do I  
15 even respond to this?

16 THE COURT: I agree. Number 6...why do you have  
17 to know every customer whose claim has not been paid? Ms.  
18 Chaitman?

19 MS. CHAITMAN: I have a series of questions which  
20 go to this issue, Your Honor.

21 THE COURT: Well, I understand the argument,  
22 although I've dealt with it already, about the Trustee's  
23 standing. Is that what this is going to?

24 MS. CHAITMAN: No. The net equity decision was  
25 rendered without any factual record. And I want to have in



1 the record the facts with respect to, as of this point in  
2 time, what claims have been paid in full, what claims have  
3 not been paid in full, and what claims have been sold.

4 THE COURT: How is that relevant to the Wilenitz  
5 case?

6 MS. CHAITMAN: Well, it's relevant to all of the  
7 cases because --

8 THE COURT: Well, let's deal with Wilenitz. This  
9 is a discovery request. And in every case, even if you use  
10 the same discovery, it's going to have to be relevant for  
11 that particular case.

12 MS. CHAITMAN: Right.

13 THE COURT: So, how is that relevant to Wilenitz?

14 MS. CHAITMAN: It's relevant to all the cases  
15 because I think that the net equity decision was based upon  
16 certain misconceptions of what the factual record would  
17 ultimately show. We have never had an opportunity to go to  
18 the Second Circuit with a developed factual record, and I'm  
19 anticipating that we will have that opportunity at the end  
20 of these adversary proceedings.

21 THE COURT: Well, you're not going to use this  
22 adversary proceeding to create a record to go back and  
23 seek... It's probably too late now, but some sort of  
24 reconsideration --

25 MS. CHAITMAN: No, but certainly with respect to

1       whether it's appropriate to allow a SIPA trustee to claw  
2       back from innocent customers. That is an issue the Second  
3       Circuit has not yet determined, and I think that it's  
4       relevant for the Second Circuit to know the facts about who  
5       the claimants are, how many claims have been sold and are  
6       owned by hedge funds or other speculative organizations...

7               THE COURT: Why is that relevant to whether or not  
8       Wilentz is liable for fraudulent transfer?

9               MS. CHAITMAN: Because, in my opinion, the Ponzi  
10       scheme exception to the affirmative defense, which has  
11       existed in fraudulent transfer law since Elizabeth I -- that  
12       is that you cannot recover an intentional fraudulent  
13       transfer from a creditor who takes in good faith on account  
14       of an antecedent debt.

15              THE COURT: And for value.

16              MS. CHAITMAN: And for value. And it's  
17       indisputable that a customer of an SEC regulated broker is a  
18       creditor of the broker -- just as if you have a bank account  
19       at Chase Manhattan Bank, that you have a debtor creditor --

20              THE COURT: No question your clients would  
21       probably defraud it.

22              MS. CHAITMAN: No, no, no, it's not a question  
23       defraud it. They were good faith creditors who took  
24       withdrawals on account of an antecedent debt.

25              THE COURT: Well, but that issue's been litigated,

1 and in every --

2 MS. CHAITMAN: But --

3 THE COURT: Let me finish. In every Ponzi scheme  
4 case that I've seen, SIPA and non-SIPA, fictitious profits  
5 are just not valued. So, even if there was an obligation to  
6 restore the principal or whatever, you don't pay value for  
7 fictitious profits.

8 MS. CHAITMAN: Well, there are two comments on  
9 that, Your Honor. I think that you may be grouping together  
10 cases where someone was an equity investor in a Ponzi scheme  
11 and cases where someone was a good faith creditor of a Ponzi  
12 schemer. And I think that the law should be different with  
13 respect to those two categories. And I think that the first  
14 statute, Elizabeth in 1571, recognized that difference.  
15 That difference is incorporated into the Bankruptcy Code,  
16 it's incorporated into the state fraudulent transfer -- the  
17 Uniform Fraudulent Transfer Law. And, in fact, both the  
18 Minnesota Supreme Court and the Texas Supreme Court have now  
19 held that it doesn't matter whether it's a Ponzi scheme; if  
20 the creditor has given value and takes the money in good  
21 faith, it's not recoverable as a clawback.

22 THE COURT: If you're talking about the  
23 (indiscernible) case in the Supreme Court in Texas, I rode  
24 that decision, and that's a creditor who provided dollar for  
25 dollar value in terms of advertising for whatever it was

1     paid, and it happened to be paid in a Ponzi scheme. But you  
2     don't provide dollar for dollar value for fictitious  
3     profits, and that's the difference.

4             But look, I hear you. Make your motion. I'm  
5     probably going to deny it because it's not relevant to  
6     whether or not Wilenitz is liable for a fraudulent transfer.  
7     Okay? Number 7. This is a similar type of request.

8             MR. JACOBS: Yes, Your Honor. I think 6, 7, 8,  
9     and 9 all relate to the claims activities. Some of the  
10    requests purport to demand us to produce documentation on  
11    behalf of the Madoff Victims Fund, which is separately  
12    administered by the Department of Justice. The Trustee has  
13    no legal responsibility for the administration of that fund,  
14    which goes well beyond claims of SIPA customers. So that  
15    obviously is completely objectionable, and we couldn't  
16    comply even if we were ordered.

17            And, generally, I do believe that these requests,  
18    6, 7 -- the unnumbered request, and 8 and 9...

19            THE COURT: Which is unnumbered? What page is it?

20            MR. JACOBS: It's between 7 and 8.

21            THE COURT: Oh, I see, I see. Yeah, between 7 and  
22    8.

23            MR. JACOBS: I do believe that these are seeking  
24    discovery and furtherance of the standing issue that this  
25    court rejected in omnibus decisions on the motions to

1 dismiss --

2 THE COURT: Well, that's what I thought.

3 MR. JACOBS: And discovery should additionally be  
4 prohibited on that basis as well, Your Honor. You analyzed  
5 the law very meticulously, and I believe you didn't reach  
6 the issue of whether the sufficiency of the customer fund is  
7 determined as of the filing date for purposes of the  
8 statute. However, you did note that there is controlling  
9 law in this jurisdiction stating that it is. And,  
10 furthermore, you found it's a factual --

11 THE COURT: Oh, I was adding (indiscernible)...

12 MR. JACOBS: Correct. Persuasive law.

13 THE COURT: Judge Rakoff adopted it.

14 MR. JACOBS: Right. And in addition to that, as a  
15 factual matter, you did find that the Trustee does have  
16 insufficient funds. And I can reiterate to you, as I  
17 believe you recently heard in our last omnibus update, to  
18 date we've recovered, approximately, 11.1 billion.

19 THE COURT: Well, you can certainly tell her the  
20 aggregate number because it's in the report. I think  
21 it's... Let me just see. You can give her the aggregate  
22 number of assets you had, and claims you paid, and unpaid  
23 claims because it's arguably relevant. I didn't really  
24 decide the issue; I just... Based on everything I had seen,  
25 it looked like -- and even the Second Circuit agreed that it

1 looked like the estate was insolvent.

2 MR. JACOBS: Right. I understand, Your Honor.

3 And, in fact, I think there's public interest in that  
4 information as well. And as we respond in each and every  
5 discovery request --

6 THE COURT: And it's in your report anyway.

7 MR. JACOBS: It's in our reports. It's also on  
8 our website, which is regularly updated, madofftrustee.com.

9 THE COURT: And so you agree she could get that  
10 information. Let's move on to... Let's get off of what we  
11 agree with.

12 MR. JACOBS: All right.

13 THE COURT: The question regarding Picard's  
14 compensation we dealt with already.

15 MS. CHAITMAN: Yeah, okay, but see, here's another  
16 thing, Your Honor. Unless and until we have an order saying  
17 --

18 THE COURT: There is an order. It was the omnibus  
19 motion order in all these adversary proceedings. We covered  
20 that issue. You preserve that issue.

21 MS. CHAITMAN: Okay. But, for example, with the  
22 subpoenas we're having the same issue. We don't have an  
23 order which says, I've held in the Sarah Lawrence case that  
24 -- there's no defense to the subpoenas, and that's  
25 applicable in all these other cases. I need to have that in

1 the record.

2 THE COURT: It's applicable to all the cases.

3 MS. CHAITMAN: Okay, can I submit an order on  
4 that?

5 THE COURT: It's already embodied in the order in  
6 the omnibus motion, isn't it?

7 MS. CHAITMAN: I don't believe so, Your Honor.

8 MR. JACOBS: I think Ms. Chaitman is raising an  
9 additional issue. The Rule 45 bank subpoenas that we  
10 litigated in Wilenitz and Sarah Lawrence --

11 THE COURT: Well, I was talking about this issue  
12 with Mr. Picard's company --

13 MR. JACOBS: That is absolutely correct. I agree  
14 with Your Honor. It is made applicable to every proceeding  
15 by your decision in the omnibus proceeding.

16 THE COURT: Well, the only thing I would say with  
17 the bank --

18 MS. CHAITMAN: But the Trustee objected --

19 THE COURT: Stop. The only thing I would say with  
20 the bank subpoenas is if a defendant admits that they  
21 received the particular transfers and the amounts are  
22 accurate, then I might conclude that there's no entitlement  
23 to the bank records based on the position the Trustee's  
24 taken. But every one of these responses to requests for  
25 admission say, it's accurate but we didn't receive it, or

1 it's accurate to the extent it agrees with the records of  
2 our accountants, and those are not answers.

3 That's the issue I have. If you just say, yeah,  
4 they're accurate, then they're accurate.

5 MS. CHAITMAN: You allowed subpoenas to be served  
6 in cases where there were blanket admissions as to --

7 THE COURT: That is not correct.

8 MR. JACOBS: That is factually incorrect, Your  
9 Honor.

10 THE COURT: You can show me and I will reconsider  
11 it, but --

12 MS. CHAITMAN: Well, the documents have been  
13 produced but --

14 THE COURT: I went through every one of those  
15 requests and Sarah Lawrence was in a different position  
16 because Sarah Lawrence said, they're right to the extent  
17 they agree with the reference my account takes.

18 MS. CHAITMAN: Right.

19 THE COURT: Others said, yes, they accurately  
20 reflect what I put in, or something like that, and what came  
21 out, but I didn't receive them. You know, it was that kind  
22 of stuff.

23 MR. JACOBS: That was the Wilenitz matter.

24 THE COURT: That was in a lot of them; it wasn't  
25 just Wilenitz. And then, you know, it just makes it more



1 difficult.

2 MS. CHAITMAN: So you want to do those on a one by  
3 one basis?

4 THE COURT: Well, if you are... I'll continue to  
5 go through them one on one, but I will tell you that if I  
6 see those kind of answers, that's going to be the end of it.  
7 All right, next is --

8 MS. CHAITMAN: Can we go to one other thing, if I  
9 can just interject?

10 THE COURT: Sure.

11 MS. CHAITMAN: Because this came up with a lot of  
12 the subpoenas. You had entered an order in Sarah Lawrence  
13 that if there was a subpoena to which I objected, I would  
14 ask for a meet and confer, and the subpoena would not be  
15 served until you -- if the meet and confer was unsuccessful,  
16 which of course it would be, we would then ask for a  
17 conference and until you resolved it, the Trustee would not  
18 serve the subpoena.

19 THE COURT: No, these were subpoenas that were  
20 served already because you were seeking protection from the  
21 subpoenas. The Trustee said he was going to serve  
22 subpoenas; he was concerned about (indiscernible). And then  
23 the original, I don't want to say agreement, but the  
24 original proposal that either before or after these were  
25 served, the Trustee would send either a request for

1 admission or proposed stipulations regarding the withdrawals  
2 and the deposits into the account during, I guess, the two-  
3 year period or the three-year period, whatever it was. You  
4 weren't being asked to stipulate to all of the withdrawals  
5 and deposits.

6 And if you admitted that they were accurate, then  
7 that was it; he didn't need the records. But if you didn't  
8 admit that they were accurate or there was some issue  
9 relating to an affirmative defense, then he would need the  
10 records.

11 In terms of the procedure that I thought was being  
12 set up, you'd confer -- and that just seems to be futile at  
13 this point because we're not getting anywhere with  
14 conferring. If it couldn't be resolved, you'd immediately  
15 write me a letter and hold a conference like this, and I'd  
16 resolve it. But that just wasn't working.

17 MS. CHAITMAN: But what's happened is that the  
18 Trustee is now serving subpoenas before he even serves  
19 discovery demands, or at the same time that he serves  
20 discovery demands, so that my clients are not even given an  
21 opportunity to admit or deny the transfer...

22 MR. JACOBS: Your Honor, may I address that?

23 THE COURT: Yes.

24 MR. JACOBS: The Defendants have an opportunity to  
25 admit to the transfers in their answer. And any day of the

1 week we will accept an amended answer that admits to those  
2 factual issues. There is no obligation in the federal rules  
3 that discovery be served in any particular order. Given the  
4 history, as the Court very aptly notes, with Ms. Chaitman on  
5 these cases and the needless litigation that has occurred on  
6 this issue, yes, we are serving bank subpoenas at the  
7 earliest possible date. Because these are delay tactics,  
8 it's causing unnecessary litigation, and the documents are  
9 being destroyed. And I know that the Defendants will use  
10 the destruction of those documents against us, as Ms.  
11 Chaitman has alluded to earlier today, and making  
12 allegations we can't prove our cases.

13 THE COURT: I'm not going to tell the Trustee that  
14 he can't serve subpoenas. If there's a subpoena served,  
15 there's nothing that stops you from amending the answer or  
16 just submitting an affidavit that says, yeah, I agree that  
17 these are the deposits, and these are the withdrawals, and  
18 either the schedule that's attached to the complaint or  
19 whatever paragraph it's alleged in.

20 MR. JACOBS: And I will reiterate, we are happy to  
21 receive that on an unambiguous stipulation or omitted answer  
22 any day of the week and we will scale a discovery.

23 THE COURT: It just hasn't worked and I don't want  
24 to go through that again. It just hasn't worked. Ten  
25 relates to the Court's compensation arrangement, 11 relates

1 to the Court's compensation...

2 MS. CHAITMAN: Right, and 12 does.

3 THE COURT: Well, 12 relates to other attorneys'  
4 compensation. And I go with that in the omnibus decision --

5 MS. CHAITMAN: Right. Okay. So, 13...

6 THE COURT: I think that the Trustee supplied the  
7 list, didn't you?

8 MR. JACOBS: We did supply --

9 MS. CHAITMAN: He supplied the list but it was a  
10 list of all the employees; it didn't break it down by  
11 what...

12 MR. JACOBS: That's not correct, Your Honor. We  
13 responded to this... I don't believe we had to --

14 THE COURT: Where is that attached?

15 MR. JACOBS: It's attached to our responses to  
16 these requests that we attached to our letter, which is  
17 dated May 4th. That's the list that has every employee that  
18 we could identify making a reasonable search --

19 THE COURT: Do you have a list that -- not  
20 creating a list, but do you have a list that breaks down  
21 which of the divisions the employee worked for?

22 MR. JACOBS: We do and we've provided it  
23 specifically.

24 THE COURT: Where?

25 MR. JACOBS: And here's the issue: I don't

1 believe it's before the Court in any of the party's filings,  
2 but all of that documentation is in the data room, which is  
3 our objection to having to even respond to the request.

4 THE COURT: Well, if it's in the data room -- I  
5 mean, even if she makes a motion to compel, if you'd  
6 convince me that it's been turned over or made available --

7 MR. JACOBS: It has. We endeavored to  
8 specifically -- we identified for Ms. Chaitman the payroll  
9 records for January 2008 that list all of the employees,  
10 which was part of the request; we identified an internal  
11 BLMIS list, which breaks out each employee by their  
12 division; and then she objected that we hadn't given her  
13 addresses and phone numbers, so we endeavored to compile the  
14 list that you see attached to our responses and our May 4th  
15 letter, which is before you now. That's a list we were able  
16 to create upon a reasonable search to the best of our  
17 knowledge.

18 THE COURT: And as I understand it, you provided a  
19 list, which identifies which of the employees work for which  
20 division?

21 MR. JACOBS: We did. It already was in the data  
22 room and always available to Ms. Chaitman. We reproduced it  
23 and identified it by Bates Number.

24 THE COURT: Ms. Chaitman, you've got to look at  
25 this stuff before you --

1 MS. CHAITMAN: Yeah, I did. I will go back and  
2 look at it again. I do not believe that it broke it down  
3 that way, but I will look at it.

4 THE COURT: All right. 14 I think is permissible.  
5 That goes back to the computation of net equity, which is  
6 basically the same as the computation of fictitious profits.

7 MR. JACOBS: Right.

8 THE COURT: And, you know, she's entitled to  
9 inquire to how you computed the net equity in a particular  
10 account. Now, it may make sense -- I don't know how you're  
11 going to do this with one expert and however many cases you  
12 have at this point, but she's certainly entitled to ask how  
13 did you compute the net equity in the transferor account  
14 back in whenever it was.

15 MR. JACOBS: I don't disagree, Your Honor. That's  
16 a subject of expert reports that will be proffered in expert  
17 discovery. There are three.

18 THE COURT: Yeah, I mean, some of this may be  
19 relevant but premature. That's all I'm suggesting.

20 MS. CHAITMAN: But why do I have to wait for an  
21 expert report? This is a factual issue. I don't even think  
22 --

23 THE COURT: But you've gotten the information  
24 already.

25 MR. JACOBS: We've produced 100 percent of the

1 underlying documentation.

2 THE COURT: It's been produced. If you want to go  
3 and do it... My response is if it's been produced and you  
4 can make this determination, then go ahead and make it.

5 MS. CHAITMAN: It hasn't been, Your Honor. Again,  
6 we're dealing with the period prior to December 1998, when  
7 there are no checks. So, how can an expert testify that  
8 something was deposited --

9 THE COURT: But that's his problem. He can only  
10 produce what he has.

11 MS. CHAITMAN: But the point is -- he didn't say  
12 here that he's not producing it because he doesn't have it.  
13 If that were in the record, it would be different. He's  
14 objecting to producing it.

15 MR. JACOBS: I'm objecting to this request in its  
16 current form as being burdensome under the proportionality  
17 standards of Rule 26 when, by court order, we are permitted  
18 to provide all of the underlying documentation and an expert  
19 summary report on this exact issue, which we have done and  
20 we will do.

21 THE COURT: As I had said, if you have provided  
22 the information or provided access to the information,  
23 that's --

24 MS. CHAITMAN: Right, and if Ms. Chaitman believes  
25 there are holes in the records or incomplete analyses, she

1 is more than able to examine those experts and conduct  
2 expert discovery on those exact issues at that time. But  
3 until she has raised a bona fide dispute, I don't believe  
4 that Rule 26 entitles defendants to blanket discovery on  
5 broad issues like this without a demonstration of the need  
6 under the proportionality standards of the rule.

7 MS. CHAITMAN: Judge?

8 THE COURT: Yeah?

9 MS. CHAITMAN: This is not proportionality. The  
10 Trustee's going to come in and say that even Berezin  
11 Wilenitz has a negative net equity based on transactions  
12 which occurred prior to December 1998...

13 THE COURT: I agree with you. But he's saying  
14 he's produced that information.

15 MS. CHAITMAN: But no, they don't have the  
16 information. What he's saying is his expert is going to  
17 say, you know, I conclude --

18 THE COURT: Does he have to tell you what he  
19 doesn't have, or does he have to simply say, I will produce  
20 everything that I have that's responsive to this request?  
21 And then you ask the expert at a deposition, you know, what  
22 records did you review? Did you review -- did you compare  
23 the account statements in 1998 with bank statements? And  
24 he'll say, well, I didn't have any bank statements. And  
25 then you can raise that at trial -- that his report, in



1 terms of the computation of net equity in the transfer  
2 account is not accurate and, therefore, you can't know what  
3 the fictitious profits were, if any, that he's suing for in  
4 this case.

5 MS. CHAITMAN: Okay. I mean, it just delays the  
6 process. Because I believe that I would be entitled to  
7 dismiss all of the complaints where the Trustee has no third  
8 party records to prove... Just as a matter of the rules of  
9 evidence, you can't prove a payment to someone through an  
10 expert report.

11 THE COURT: Well, I don't know how the expert...  
12 If the expert had no records, I don't know how the expert  
13 came up with the report. So, obviously, the expert has some  
14 records and is probably extrapolating --

15 MS. CHAITMAN: The expert has Madoff statements.

16 THE COURT: I agree with you... Let me just  
17 finish it off on this. I agree with you that you were  
18 entitled to inquire into the computation of fictitious  
19 profits, which may go back to the beginning of time. On the  
20 other hand, the Trustee can only produce what he has. I'm  
21 told the Trustee has made that available. And then the next  
22 step is to ask the expert what he relied on and what he  
23 didn't have to determine what the gaps are in the evidence  
24 if you can't determine it from what the Trustee's produced.

25 If you are concerned that the Trustee is suddenly

1 going to show up with records that he didn't produce, you  
2 know, that's true in every case. And then I guess we'll  
3 have a fight over whether or not these documents were ever  
4 made available to you. Let's move on.

5 15 is this insolvency issue. And maybe in  
6 response to the motion to compel...well, I guess there are  
7 other lawyers involved on this issue.

8 MR. JACOBS: Yes. And I would...

9 THE COURT: Maybe it's a good omnibus issue.

10 MR. JACOBS: Yes, I believe that you suggested  
11 that earlier and I think we would love to confer about that.

12 THE COURT: Except in certain streamlined cases,  
13 if insolvency is irrelevant. I remember when I saw this  
14 issue, it just struck me that it's irrelevant in an  
15 intentional fraudulent transfer case.

16 MS. CHAITMAN: Okay, so, 16, Your Honor, goes to  
17 the issue that I had raised with you once and you said you  
18 were familiar with --

19 THE COURT: I thought that information has been  
20 provided already, though. Didn't you provide the DTC  
21 records?

22 MR. JACOBS: We have, Your Honor, going back to  
23 2002 -- maybe it was 2003; I'd need to check, but one of  
24 those two years for sure.

25 THE COURT: Is that the last year or the first

1 year that you have records?

2 MR. JACOBS: Yeah. So, what we did -- because I  
3 think it's helpful, I'd love to explain very briefly -- we  
4 did rule 2004 subpoena DTC. They produced records to us.  
5 Ms. Chaitman has copies of those productions. We also  
6 restored all of the live data on the active DTC terminal  
7 that BLMIS used. Ms. Chaitman has all of that data.

8 DTC had also made a similar production to the SEC;  
9 Ms. Chaitman also has a copy of that production. And,  
10 collectively, those records show daily trading positions  
11 going back to 2002.

12 THE COURT: So, what more do you need?

13 MS. CHAITMAN: Your Honor, let's just hypothesize  
14 we're talking about someone whose net equity is calculated  
15 over a period beginning in 1982, okay? The only way, in my  
16 opinion, that the Trustee could conceivably be entitled to  
17 this Ponzi scheme presumption, which would allow him to void  
18 transfers going back to 1982, is if Madoff was operating a  
19 Ponzi scheme in 1982.

20 THE COURT: Right.

21 MS. CHAITMAN: And I'm entitled -- let's assume,  
22 for example, that he had 200 employees, six of them were  
23 involved in the Ponzi scheme, 194 of them were involved in a  
24 legitimate trading business, and the legitimate trading  
25 business did \$16 trillion, and the Ponzi scheme in 1982 did

1 half a million.

2 THE COURT: Mm hmm.

3 MS. CHAITMAN: You could very reasonably determine  
4 that the Ponzi scheme presumption cannot apply to that year.

5 THE COURT: Okay. I'm not arguing with you but I  
6 thought that whatever records they had had been turned over.

7 MS. CHAITMAN: No, they have internal records that  
8 they have not turned over. They have monthly reports as to  
9 what the trading volume was in the market making unit, in  
10 the investment advisory unit, and in the --

11 THE COURT: Well, the investment advisory but  
12 there's no trader.

13 MS. CHAITMAN: Excuse me, I mean the market making  
14 and the proprietary trading.

15 MR. JACOBS: We have turned over everything that  
16 we have. We scoured the ends of the earth, we have been in  
17 discussion with DTC to try to find out if there are more  
18 documents. Ms. Chaitman subpoenaed DTC. She obviously has  
19 subpoena power. She can go out into the world and conduct  
20 third-party discovery...

21 THE COURT: Okay, but she's entitled also to ask  
22 you what documents you have.

23 MR. JACOBS: Your Honor, we didn't make 4 million  
24 records available because we're trying to hide anything. We  
25 have made everything we have available within the parameters

1 of what is readily accessible and reasonable under the  
2 federal rules of civil procedure. Well beyond that. But we  
3 have made everything on this issue that we have available.

4 And, again, Mr. Dubinsky in his report, as Ms.  
5 Chaitman knows, again, it hasn't been served here yet --  
6 goes through a painstaking analysis of how the IA business  
7 never conducted trades. It also goes through a painstaking  
8 analysis of how cash infusions from the Ponzi scheme propped  
9 up House Five, which is the --

10 THE COURT: Right, but she's still entitled to the  
11 records.

12 MR. JACOBS: She has all of the records.

13 THE COURT: All right, then if she has them, she  
14 has them.

15 MS. CHAITMAN: Well, why can't he -- if he claims  
16 that there are monthly reports for the legitimate trading  
17 units, why can't he just give me the Bates Numbers? Why do  
18 I have to go on a fishing expedition through 4 million pages  
19 of documents and then come back and say, they're not here?

20 THE COURT: Wouldn't he have to do the same thing?

21 MR. JACOBS: That's exactly what this is, Your  
22 Honor, a fishing expedition.

23 MS. CHAITMAN: They know where they are.

24 MR. JACOBS: One of the exact criteria under Rule  
25 26B2 is she has equal access to the records that we do.

1 THE COURT: And, again, this comes back to my  
2 understanding of the records. If you have tables of content  
3 or indices...

4 MR. JACOBS: I do.

5 THE COURT: I don't want to see them now.

6 MR. JACOBS: Okay.

7 THE COURT: If you have those things and somebody  
8 can look at them and see the subject matter of what they  
9 want to look at, figure out what to look at, fine.

10 MR. JACOBS: There is a subfolder in Data Room 1  
11 that is called DTC that has all of those records.

12 MS. CHAITMAN: I'm not asking for -- I have the  
13 DTC records.

14 THE COURT: She wants other non-DTC records.

15 MR. JACOBS: To the extent we have them in  
16 addition to publicly available information that we obtain,  
17 it's all in the data room clearly labeled.

18 THE COURT: You'll have to show me when the time  
19 comes. 17 -- these are the number of employees that work  
20 for each unit.

21 MR. JACOBS: Yes, Your Honor. And as I had  
22 mentioned before, we provided a specific chart that contains  
23 this exact information, even though I believe we're not  
24 obligated to because it had already been made available in  
25 the data room and could've been found with the click of a

1 mouse.

2 MS. CHAITMAN: I've asked for each year of the  
3 operation. I have it only for the last year.

4 MR. JACOBS: To the extent we have it, again, the  
5 Defendant has equal access to those documents. We shouldn't  
6 have to do their work for them.

7 THE COURT: And how would she know who's working  
8 for which division each year?

9 MR. JACOBS: Your Honor, how would we know? The  
10 Trustee doesn't have personal knowledge. We would have to  
11 do an investigation, which is what the Defenders would do.

12 THE COURT: This is interrogatory. How would you  
13 do that investigation?

14 MR. JACOBS: We would do exactly what Ms. Chaitman  
15 would have to do and start searching through the document  
16 repository to find supporting documentation that would  
17 answer those questions based on our best ability, without  
18 personal knowledge of having been present at the time.

19 THE COURT: Well, you know, that's an aspect of  
20 the case. Nobody really has personal knowledge, who's  
21 involved in the case at this point.

22 MR. JACOBS: Right.

23 THE COURT: Everything is through records.

24 MR. JACOBS: But also, Your Honor, what's the  
25 relevance? What is the relevance?

1 THE COURT: Well, her argument, though, is that it  
2 wasn't a Ponzi scheme if, of the 200 employees, 190 were  
3 working for the so-called legitimate divisions of BLMIS, and  
4 those divisions were generating a lot of money. Now, that's  
5 probably not the case...

6 MR. JACOBS: Right.

7 THE COURT: ...in terms of generating money; I  
8 don't know about the number of employees, from everything  
9 I've seen. But, you know, I guess it's relevant to whether  
10 or not there was a Ponzi scheme on the date of a transfer.

11 MR. JACOBS: Well, all of the financial  
12 information concerning the House Five's operations is in the  
13 data room in a folder...in various folders. That's  
14 available to the Defendants -- as it's discussed in the  
15 report of Mr. Dubinsky.

16 THE COURT: I didn't understand 19.

17 MS. CHAITMAN: You didn't understand the  
18 interrogatory?

19 THE COURT: Yeah. I just had a note here, I  
20 didn't understand. Let me read it again.

21 MR. JACOBS: Well, Your Honor --

22 THE COURT: Let me just read it.

23 MR. JACOBS: Okay.

24 THE COURT: Oh, the reason I guess I didn't  
25 understand it is I didn't think BLMIS held any stock.



1 MS. CHAITMAN: Well, it was Madoff until 2001, and  
2 then nit was BLMIS. There were times when Madoff did trades  
3 equal to 10 percent of the daily volume on the New York  
4 Stock Exchange. He had a huge portfolio of securities.

5 So, what I'm asking is -- I mean, let's assume  
6 that every security which was listed on the split strike  
7 conversion customer statements was actually held in huge  
8 volumes by Madoff at the time. It simply wasn't allocated  
9 to the investment advisory --

10 THE COURT: But I thought it wasn't held. I  
11 thought he never engaged in a securities transaction.

12 MS. CHAITMAN: Only -- what the Trustee has said,  
13 he never engaged in securities transactions in the  
14 investment advisory business.

15 THE COURT: Right.

16 MS. CHAITMAN: He had huge stock positions with  
17 the same securities... I mean, I've been able to do this  
18 with the DTC records. I can show that every security that  
19 was listed on an investment advisory customer statement was  
20 held by Madoff at that time.

21 THE COURT: Mm hmm.

22 MS. CHAITMAN: But the point is, I can't go back  
23 before 2002, and I'm asking the Trustee if he has the  
24 records to give that to me.

25 THE COURT: So, how is this interrogatory

1 different from, I think it was 16 he was talking about? 16  
2 doesn't ask to identify the specific stock but...

3 MS. CHAITMAN: I'm just getting the volume.  
4 Because one of the arguments will be that the investment  
5 advisory volume was X percent of the total and, therefore,  
6 this was not a Ponzi scheme.

7 THE COURT: And what does 18 relate to?

8 MS. CHAITMAN: 18 relates to the specific  
9 securities. In other words, the Trustee's position is that  
10 Madoff did not own the securities that were shown on the  
11 statements. And, in fact, I've already established that  
12 Madoff did own the securities that were shown on the  
13 statement; not in the volume that was on the statement.

14 THE COURT: Owned them in its own name?

15 MS. CHAITMAN: Madoff's or BLMIS. Yeah, for that  
16 period it's BLMIS, yes. Yeah, they held securities. They  
17 were a huge securities dealer. So then how do you decide  
18 whose securities they were?

19 THE COURT: Well, BLMIS held it in its own name,  
20 right?

21 MS. CHAITMAN: Yeah. But the thing is if you buy  
22 100 shares of IBM today from Merrill Lynch, they don't have  
23 to actually get the securities and stick them in your  
24 pigeonhole. They have them on account; they owe it to you.

25 THE COURT: And how is this relevant to the

1 lawsuit?

2 MS. CHAITMAN: Because there's no... The basis of  
3 the Trustee's argument is that there were no securities ever  
4 purchased. There was one entity, whether it was Madoff as  
5 the sole proprietor or BLMIS, there was one entity operating  
6 a company with 200 employees, of which a very small  
7 percentage were involved in the investment advisory  
8 business. If that entity held securities positions, who's  
9 to say that they couldn't have been allocated to Mrs.  
10 Wilenitz?

11 MR. JACOBS: I think that is a tenuous assertion  
12 at best. And Ms. Chaitman again needs to make a showing  
13 that those securities were actually held on behalf of the IA  
14 business customer and her defendant, I think, in order to  
15 show an entitlement to discovery.

16 THE COURT: How would she show the allocation, or  
17 how would you show that they weren't --

18 MR. JACOBS: Well, I mean, Ms. Chaitman says she's  
19 done an inventory of the DTC records and it looks like there  
20 might've been a stock held at some point in connection with  
21 some function of BLMIS that matches the name of a stock  
22 appearing on a customer statement. That's not proof that  
23 the stock was ever bought or sold on behalf of that customer  
24 for their account.

25 THE COURT: But what would you have to show to

1       prove that? I'm assuming in the best of circumstances you  
2       have BLMIS owning 100 shares of IBM.

3               MR. JACOBS: Right.

4               THE COURT: And the Wilenitz account statement  
5       showing 50 shares of IBM.

6               MR. JACOBS: Right. Well, as is discussed at  
7       length in our expert report, one example is that many of the  
8       customer statements reflect purported stock trades that  
9       couldn't have been possible given the price and the amount  
10      purported to have been sold as reflected on the customer  
11      statements.

12              THE COURT: But she's saying something different  
13      on this one. She's saying there was an actual trade and  
14      BLMIS owned an actual stock from one of its other  
15      businesses.

16              MR. JACOBS: Right.

17              THE COURT: One of the (indiscernible) divisions.

18              MR. JACOBS: Right.

19              THE COURT: And then she's saying, you know what?  
20      I realize this is supposition at this point. The Wilenitz  
21      account statement shows the same stock.

22              MR. JACOBS: Right.

23              THE COURT: So, there was actually a purchase, and  
24      who's to know whether or not that purchase or a portion of  
25      that purchase was allocated to Wilenitz? In my example,

1 BLMIS bought 100 shares of IBM and 50 shares show up on  
2 Wilenitz.

3 MR. JACOBS: Right.

4 THE COURT: Who's to say he didn't actually own  
5 that stock?

6 MR. JACOBS: I would love to be able to --

7 THE COURT: Which I guess would be relevant to his  
8 net equity claim or his claim in the SIRA case.

9 MR. JACOBS: I wish I could give you a  
10 satisfactory answer but in the time that we have today, I  
11 can't replicate the report of our expert, which, in  
12 painstaking detail goes through all of the reasons why we  
13 believe there was never a security traded in connection with  
14 the fraudulent Ponzi scheme being operated and the IA  
15 business.

16 THE COURT: So, how does she test that conclusion?

17 MR. JACOBS: She tests that conclusion the same  
18 way our expert does, by examining the underlying records.  
19 All of those records again have been made available to Ms.  
20 Chaitman. They're in the data room. Those other records  
21 are expert reports.

22 THE COURT: Maybe that's the answer. If there are  
23 records -- because they do have the DTC records, at least  
24 from the period when Wilenitz was investing. If the records  
25 show that BLMIS actually owned something, and the same stock

1 shows up in Wilenitz's account statement, you can make the  
2 argument that he actually owned that stock. But you can do  
3 that (indiscernible) and the information has been made  
4 available to you.

5 And the sense I'm getting -- and I understand that  
6 it's a lot of work -- is you want the Trustee to do this for  
7 you, but you're going to have to do this yourself if this  
8 stuff is available.

9 MS. CHAITMAN: You know, Judge, with 4 million  
10 pages of documents, the least the Trustee could do is  
11 specify the specific Bates Numbers. Because I don't want to  
12 be in a position where we go to trial... I mean, for all I  
13 know, the data room is updated constantly and new documents  
14 are added. How am I going to prove at trial that certain  
15 documents were not made available to me? I mean, it's  
16 impossible. Why can't the Trustee be bound to tell me these  
17 are the documents responsive to this request?

18 THE COURT: But that doesn't solve your problem...  
19 Well, if the Trustee has additional documents, he's got to  
20 supplement the disclosure or the production, which he does  
21 by adding them to the data room, and maybe you have a  
22 continuing duty to check the data room.

23 But part of the problem is you've thrown such a  
24 broad net over what you're looking for, instead of the  
25 specific documents relevant -- that I think seem to be

1 relevant to this particular case, that you run into a  
2 situation where there may be documents added about something  
3 but they have nothing to do with Wilenitz.

4 MR. JACOBS: And, Your Honor, specifically to  
5 respond to Ms. Chaitman's concern about the data room being  
6 voluminous, and I understand that 4 million records is  
7 overwhelming, but that's the reason why the procedures order  
8 permits us to provide an expert summary report to support  
9 our claims and to satisfy our burdens of proof, which  
10 specifically discusses all of that data, identifies all of  
11 the Bates Numbers of the documents that are used to support  
12 various conclusions -- and at a minimum, Ms. Chaitman is  
13 free to depose those experts and to test and challenge any  
14 of those analyses based on any of the documents they've  
15 relied upon or that she has access to in discovery.

16 And no one's challenging her right to do that.  
17 What we're saying is that we shouldn't have to do more than  
18 what we've already done because we have invested enormous  
19 amounts of resources and time in finding a way to make all  
20 of those information available to all litigants in order for  
21 them to conduct their own investigations and have access to  
22 the same information that we do.

23 THE COURT: Well, you know, I started out by  
24 saying, I can't tell you not to make a motion to compel, but  
25 I think that if you go back, for example, and look at the

1 omnibus decision last June, for instance, it talks about the  
2 compensation issue -- it's certainly applicable to all the  
3 cases which are involved. I think you preserve that issue.

4 And I'm sure the Trustee, so the Trustee doesn't  
5 have to respond to all these things, will agree, yeah, you  
6 preserve the issue but you're not entitled to discovery on  
7 these issues for that reason. But there just seems to be  
8 very little communication, and I don't know what the answer  
9 to that is.

10 Okay, you had raised some other issues and Mr.  
11 Dexter raised some issues in a letter...

12 MS. CHAITMAN: I think that had to do with the  
13 subpoenas, and I'm going to have to deal with that  
14 separately.

15 THE COURT: Well, what was that issue? Have we  
16 resolved all of the issues raised by the Trustee?

17 MR. JACOBS: Yes, except for, Your Honor, I'd like  
18 to clarify that we would also like to submit a motion for a  
19 protective order on this discovery.

20 THE COURT: Well, she's going to make a motion to  
21 compel. I'll just stay it until I resolve the motion to  
22 compel.

23 MR. JACOBS: Okay.

24 THE COURT: I don't need a motion for a protective  
25 order and a motion to compel on the same discovery.



1 MR. JACOBS: Right. Well, we did ask for the  
2 relief first and I believe from a fairness -- we should be  
3 entitled to make --

4 THE COURT: Do you want to wait for them to make a  
5 motion for --

6 MS. CHAITMAN: It doesn't matter. If he wants to  
7 make the motion...

8 MR. JACOBS: I'm trying to avoid unnecessary  
9 duplicate briefing.

10 THE COURT: All I'm saying is -- maybe this is  
11 wishful thinking, but if she makes the motion to compel, on  
12 reflection she might not ask about Picard's compensation,  
13 for example.

14 MR. JACOBS: Okay.

15 THE COURT: And that will save everybody the job  
16 of dealing with that issue. But I don't know if that's  
17 going to be the case.

18 MS. CHAITMAN: Judge, on Picard's compensation, I  
19 understand you ruled on that and it's applicable to every  
20 case. I'm not...

21 THE COURT: Well, if you're concerned -- I'm not  
22 going to rule on it again. If you're concerned -- if the  
23 record is preserved, it's preserved. But that doesn't seem  
24 to have any effect on these cases, if I rule on something.  
25 That's my only point. It goes both ways, by the way. Don't

1 smirk.

2 MR. JACOBS: No smirk here.

3 THE COURT: Yeah, it seems that everybody seems to  
4 ignore prior rulings in this case when we litigate things.  
5 All right, what else from the Trustee?

6 MR. JACOBS: That is it from our perspective, Your  
7 Honor.

8 THE COURT: Are there any other issues?

9 MS. CHAITMAN: That's it.

10 THE COURT: What did Mr. Dexter raise?

11 MS. CHAITMAN: He was raising the Rule 45 subpoena  
12 issue, but I want to go back...

13 THE COURT: And what is that issue?

14 MS. CHAITMAN: The issue is whether the Sarah  
15 Lawrence order as to the procedure is going to go forward.  
16 You clarified that you don't feel it's appropriate and that  
17 the Trustee can serve the subpoenas. But you're telling me  
18 that if, in fact, people can stipulate to the records...I  
19 mean, I just want to clarify that because --

20 THE COURT: You know, the devil is in the details.  
21 And it sounded so easy to resolve it that way but it just  
22 hasn't gotten resolved.

23 MS. CHAITMAN: No, I appreciate that. I agree  
24 with you.

25 THE COURT: What I will not do is stay discovery

1 pending, you know, a meet and confer, anything like that.  
2 If you get discovery and you think -- or you get a notice of  
3 a subpoena on a bank, and you can unconditionally say that  
4 the records are the records...

5 MS. CHAITMAN: Well, the records are the records  
6 for the period covered by the bank documents. People cannot  
7 possibly stipulate to transfers ten years ago.

8 THE COURT: Well, but then if you can't, I guess  
9 he's entitled to the bank documents. And if the answer  
10 is... We talked about this, whether there were periods that  
11 could be carved out. Even that wasn't answered clearly in  
12 the...

13 MS. CHAITMAN: But if a bank only has records  
14 going back to 2006, why is the price of protecting those  
15 records that you have to concede to all the transfers going  
16 back to 1982?

17 THE COURT: Yeah, but you can concede to all the  
18 transfers going back to 2006 in your example.

19 MS. CHAITMAN: We did that, and that was --

20 THE COURT: That was not my recollection.

21 MS. CHAITMAN: All right.

22 THE COURT: Go back and look at your responses to  
23 the nine or so cases that we dealt with, and every one of  
24 them retracts or has a caveat to what is essentially an  
25 admission. And remember what we're trying to accomplish

1 here. You know, cut down on the issues that have to be  
2 tried. And if they don't do that, then they don't serve  
3 their purpose and everybody goes about and takes discovery,  
4 that's all. All right.

5 MS. CHAITMAN: Okay.

6 MR. JACOBS: Your Honor, there were also  
7 objections to subpoenas in three cases handled by my  
8 colleague, Ms. Longo, as conflicts counsel for the Trustee.

9 MS. CHAITMAN: It's the same issue, and at this  
10 point I understand Your Honor's position so...

11 THE COURT: Well, Wilenitz is one of them.

12 MS. CHAITMAN: They have those documents already.

13 MR. JACOBS: Right. Wilenitz was part of the --

14 THE COURT: And the RAR...

15 MR. JACOBS: RAR is our case, and if Ms. Chaitman  
16 is withdrawing the objection, we've served the subpoena...

17 THE COURT: I haven't seen the responses to the  
18 admissions or whatever.

19 MS. CHAITMAN: With RAR we will stipulate to the  
20 deposits and withdrawals for the period that --

21 THE COURT: That's all well and good. When you  
22 send him the -- whatever it is -- the stipulation or the  
23 affidavit that proves that or requires that, then ask him to  
24 withdraw the subpoena. And I guess we'll have to deal with  
25 that again if he refuses to withdraw the subpoena.

1           And the reason I say that is I've seen the  
2           responses in the other cases and the non-responses. That  
3           would compel to withdraw --

4           MS. CHAITMAN: I'm saying on the record that we  
5           will stipulate to the deposits and withdrawals for the  
6           period covered by the bankruptcy.

7           THE COURT: And what I'm saying on the record is  
8           when that is writing in a satisfactory form, then we'll deal  
9           with it, okay?

10          MS. CHAITMAN: Okay.

11          THE COURT: Is there anything else?

12          MS. LONGO: So, just to clarify, Your Honor, I'm  
13          sorry, with respect to the two cases that are handled by  
14          Wilenz, is there a withdrawal of the objection in those?

15          THE COURT: She's not withdrawing the objections.

16          MS. CHAITMAN: I'm not withdrawing the objections.

17          MS. LONGO: You'll go back and check...I  
18          understand.

19          THE COURT: She's going to go back and see if she  
20          can stipulate to the withdrawals -- either all the  
21          withdrawals and deposits or for whatever period it is.

22          MS. CHAITMAN: Right.

23          THE COURT: And then you may be entitled to  
24          records before that, although you're only asking, I think,  
25          for three years anyway.

1 MR. JACOBS: All of our subpoenas are different  
2 depending on how long we --

3 THE COURT: Every one I've seen is the two years  
4 before the filing date and one year after.

5 MS. CHAITMAN: Now they're going back to 2001.

6 MR. JACOBS: Well, there are some cases --

7 THE COURT: Well, I'm surprised they haven't.  
8 I'll tell you. Because, you know, this issue with  
9 fictitious profits is the same. And you can't just look at  
10 the two years. You've got to go all the way back to the  
11 beginning of the account. And I was surprised when they  
12 limited it to two years for that reason. I was also  
13 surprised about the insolvency issue but...life is full of  
14 surprises. How was Barcelona? Was it good?

15 MS. CHAITMAN: Oh, my God, I loved it.

16 THE COURT: All right, anything else?

17 MS. LONGO: I was just going to say, to be clear,  
18 our two do go back further than the two years. So I think  
19 the stipulation would have to cover all of those transfers.

20 THE COURT: Whatever it is. I mean, it sounds to  
21 me that if you go far back enough, you're going to get a  
22 response from the bank that says, we don't have the records,  
23 you know, but so be it.

24 MS. CHAITMAN: Thank you very much.

25 THE COURT: All right.

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MR. JACOBS: Thank you, Your Honor.

(Whereupon these proceedings were concluded at  
12:17 PM.)

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing  
transcript is a true and accurate record of the proceedings.

Sonya

Ledanski Hyde

Digitally signed by Sonya Ledanski  
Hyde  
DN: cn=Sonya Ledanski Hyde, o, ou,  
email=digital1@veritext.com, c=US  
Date: 2016.05.19 16:30:11 -04'00'

Sonya Ledanski Hyde

Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501

Date: May 19, 2016